**January 28, 2003**

**Report to The Supreme Court of Michigan**

**Summary of Considerations Regarding Proposed Amendment to MRE 703 and Responses to Recent Public Comments**

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## Introduction

The Court will recall that I was unable to attend the public hearing of September 26, 2002 regarding the proposed amendments to MRE 703 and MRE 1101 because of a prior commitment to speak at the same hour at the State Bar Annual Meeting. I have since been provided a transcript of the hearing (minus an unrecorded portion of unknown length), and in this memorandum I will attempt to respond to the comments made at that time, and some others as well. If I may, I will make those responses in the course of summarizing what I believe to be the considerations that operate in favor of adopting the original recommendation of the Advisory Committee on the Rules of Evidence (Alternative A), together with the related amendments to MRE 1101.

For ease of reference I have attached the proposed rules to this memorandum, as they would appear after amendment. In the case of proposed MRE 1101(b)(10) I have noted minor changes to the published version that have been recommended by the membership of the Michigan Probate Judges Association, with which I concur, as explained in my letter to the Court of July 11, 2002.

The outline summary of the discussion is as follows:

I. The only question of any significance facing the Court regarding the proposed amendments to MRE 703 and the related amendments to MRE 1101 is whether the rule should be amended at all.

   A. There are several compelling reasons for amending MRE 703.

   B. The objections to the Rule 703 amendments by the proponents of child custody expert testimony do not present any reasonable obstacle to amending the rule.

   C. The former objections of the Michigan Judges Association and Michigan Probate Judges Association are no longer a consideration for rejecting an amendment to Rule 703.

D. The only significant consideration regarding amendment of Rule 703 is whether it should be amended in the face of the indifference or opposition of many members of the bar engaged in general litigation, and that question should be resolved in favor of amending the rule.

II. If Rule 703 should be amended, the only rational choice among the candidates for amendment is the original recommendation of the Advisory Committee, supplemented by the proposed amendments to Rule 1101:

A. The federal rule is an unacceptable solution to the problems with MRE 703.

B. Alternative B is not an acceptable amendment.

C. The only acceptable choice is the original amendment recommended by the Advisory Committee.

## Discussion

### I. The only question of any significance facing the Court regarding the proposed amendments to MRE 703 and the related amendments to MRE 1101 is whether the rule should be amended at all.

#### A. There are several compelling reasons for amending MRE 703.

The reasons for amending MRE 703 were discussed at length in the original report of the Advisory Committee in August, 2000. Some recapitulation may be useful here.

First, there is strong evidence for the necessity of change in the bare fact that Congress, the inventor of Rule 703, has seen fit to amend it a bare twenty-five years after its enactment. Twenty-five years is less than the blink of an eye in the history of the law of evidence, and there had to be compelling reason to move an entire federal bureaucracy to get the rule changed in so short a time. The announced purpose of the amendment was to limit the disclosure to the jury of inadmissible information that is used as the basis of an expert's opinion.

Michigan's version of Rule 703 has proven to be singularly virulent toward the hearsay rule. Whatever the shortcomings of the original federal rule, it at least had a nominal screen (as the amended rule also has) for the kind of hearsay that would suffice for the basis of expert opinion, i.e., the hearsay facts had to be the kind "reasonably relied upon" by experts in the field in question. While it is true that this amorphous test proved to be an ineffective screen of hearsay foundation

facts, Michigan's rule does not have even that modest safeguard, with the result that hearsay is admitted in our courtrooms every day by the device of having one's own expert "rely" on the hearsay data. The irony of this result, as explained in the Advisory Committee report, is that it came from an attempt to give the Michigan practice a more effective guard against hearsay foundation facts, i.e., the discretion of the trial judge to require foundation facts to be proved as a prerequisite for expert opinion; a discretion that, in actual practice, is neither invoked nor exercised.

Practically speaking, therefore, there is no hearsay rule in the considerable number of cases tried today that employ expert testimony. It is a common tactic for plaintiffs and defendants alike to inject hearsay evidence by the device of giving it to their expert in advance. A further natural consequence of the rule is a proliferation of experts, an expansion accompanied by massive costs in preparing for and offering expert testimony.

A particularly unfortunate result of Rule 703 has been the use of child custody experts hired for partisan purposes, much in the same way that partisan experts have always been hired in personal injury cases, thus significantly increasing the cost and stress of litigation for those who are the most vulnerable to those burdens, but with little accompanying utility, as acknowledged in the experts' own literature.

### B. The objections to the Rule 703 amendments by the proponents of child custody expert testimony do not present any reasonable obstacle to amending the rule.

Some family law attorneys and some of the child custody experts continue to be the most vocal opponents of any change whatsoever to MRE 703. The court should be dismissive of this source of objection because the proposed MRE 1101(9) gives these objectors everything they say they want.

That conclusion is in fact supported in the extensive comments made by persons representing this group at the public hearing in Grand Rapids on September 26, 2002. Their remarks fill twenty-two single spaced pages of transcript of the hearing and constitute the overwhelming share of the comments made about Rule 703 that day. Most of those comments were made on nonexistent issues that diverted the Court's attention from more significant matters.

For example, much of the discussion centered on the need for child custody experts to gather information independently, and the practical difficulties that the amendments would supposedly present in attempting to separate reliable facts from those that are not. They spoke of the necessity of bringing teachers to court, and debated the utility of sanctions against parties who require them to attend by a frivolous hearsay objection.

All of this has been rendered moot. When the first protests from the family law contingent were made, it was recognized that there is a legitimate place in child custody litigation, in appropriate cases, for the evaluation of a *neutral* observer skilled in such matters, and an enabling

amendment to MRE 1101 was proposed in my report to the court of February 23, 2001, under which amendment the report of a child custody expert, containing whatever hearsay information that is deemed necessary, would be available to a trial judge under the auspices of the friend of the court statute. The newly-added Rule 1101(b)(9) would also correct the longstanding judicial disregard of the friend of the court statute.

It seems that the "family law" representatives either ignored the fact that the amendments contain an exemption for a neutral child custody report, or they were not aware of it. In the case of attorney **Richard Victor**, for example, while it appears that he considered his remarks as given in opposition to the proposed amendments, what he said was in fact an eloquent support for them. The following is an excerpt from his remarks:

> The emotional turmoil of divorce is well known by everybody. But oftentimes we need to know the whole picture and the whole story. If we limit psychologists when they are doing an *independent* investigation, and *remember they are 706 experts appointed by the court as the court's expert, allegiance only to the judge and to the children,* they are the only ones who are allowed to give opinions because *unless you are able to interview all of the parties and children involved, the licensing regulations don't even allow them to make a recommendation on custody. We need to exempt 706 experts* so that they can talk to teachers, talk to family members, talk to neighbors. So that we don't have to call all of those people into court as a witness.... (Transcript, p.4.)

Mr. Victor apparently had not appreciated that the proposed amendments would insure that the only child custody reports that would be received are those that meet the conditions he prescribed. That is to say, a report requested by the friend of the court at the direction of the judge; or, to be sure, a report stipulated to by the parties. The costly, burdensome, and ineffective practice of unilaterally hiring partisan experts would be eliminated, because those experts would not have the hearsay exemption afforded by the statute. In any event, as Mr. Victor observed, the ethics of their profession forbid giving a custody opinion unless they have interviewed all parties, a privilege that would be extended only to an expert appointed by the judge or agreed to by the parties.

After telling the court that parties do not hire their own experts under the present practice, Mr. Victor told the court of an instance where exactly that happened to him:

> Well okay, you ask a great question. I tried a case in Genesee County and the judge was allowing a woman's therapist to come in and testify that she should have custody. The therapist never saw my client, the man. And I had to raise my objection and I had to argue to the court and convince the court that they should not take the recommendation. And I would suspect that some people would have allowed that in, inappropriately and incorrectly. (Transcript, pp. 12-13.)

The opponents of the amendments are fond of saying, as Mr. Victor first said, that litigants today do not unilaterally hire their own experts. But Mr. Carlo Martina, who later spoke on behalf of the State Bar Family Law Council, also admitted that it happens. And if it *were* true that only a

handful of custody litigants hire their own partisan experts, the amendments would have little effect on the present practice, and nothing inappropriate would happen if only a small number of litigants would be spared the tremendous cost of a practice that exists only because the rules allow for it.

The savings to child custody litigants under the proposed amendments, moreover, would be more than those realized by eliminating the cost of partisan reports. Under the present rules, if the report of even a neutral child custody expert doesn't produce a settlement and a trial is required, it is necessary to call the expert as a witness because, even though the expert can rely on hearsay information, the expert's *report* would itself be hearsay, and it is necessary to call the expert to testify. Under the proposed amendments, however, the report itself would be available to the judge for whatever value it may have, and the expense of the testimony would not be necessary in order to provide a basis for the ultimate decision of the court. Of course the court or one of the parties might want the expert to testify anyway, but that part of the expense would be no more than under the present rule.

**Dr. Robert Erard** addressed the court on behalf of the **Michigan Psychological Association** and the **Society of Forensic Psychologists**. He repeats contentions that have already been addressed at length. He speaks again, for example, of the supposed effect of the amendments on psychiatric examinations in criminal cases and on expert testimony in probate court, without mentioning the existing statutory exemptions for both (see discussion at pages 13 and 14 of my report of February 23, 2001) and without mentioning the exemption for emergency civil commitments in probate court afforded by proposed MRE 1101(b)(10). Dr. Erard did mention the effect of the amendment in personal injury cases, but that, of course, is one of the intended results of the amendment.

Dr. Erard's principal interest has concerned the effect of the amendments on child custody expert testimony, and his remarks avoided the least recognition that the Rule 1101(9) amendment will give the child custody experts and practitioners everything they say they want, i.e., an expert who is (1) neutral and independent, (2) able to interview all of the affected persons, and (3) able to make a recommendation based on whatever sources and hearsay information that the expert deems relevant.

So what points *did* Dr. Erard raise in objection to the proposed amendments? They are these:

1. *Not all experts are spoon fed the factual bases of their opinions by the lawyers who hire them.*

This is a creative way of repeating the contention that experts should be able to base their opinion testimony on hearsay facts that they collect themselves. We are back to where we started.

No one says that experts working in their own professions should not rely on hearsay. But when they hire themselves out to testify in court on behalf of a party, they are no longer practicing their profession. They have made themselves part of the adversary system that adjudicates the legal

rights. When they do *that,* they must abide by the rules of the court system, not the standards of their own profession. The question before the Court relates to the proper administration of law; not psychology, medicine, engineering, or any other art or science.

But the final irrelevance of the perseveration about the necessity of relying on hearsay is that the report of neutral child custody expert has been exempted from the hearsay rule altogether. Of this nothing is said, except for a false claim, as we shall see next, that the exemption will cast a great burden on the friend of the court.

2. *The amendments will impose completely unrealistic administrative and financial burdens on Friend of the Court Systems throughout the state.*

Not true. Dr. Erard may have misread the memorandum of February 23, 2001. The total involvement of the Friend of the Court in procuring an expert report under the amendments would be to complete a form letter and send it to the expert chosen by the court or agreed to by the parties. A specimen form letter is attached to this memorandum.

It is true that Friend of the Court offices are overburdened, and that is undoubtedly why their recommendations today on custody are more or less perfunctory (in addition to the fact that some decisions call them hearsay). But the proposed amendments will not require those agencies to file any more extensive a recommendation than they do today.

Nevertheless, what terrible result would it be if, some day, some friend of the court, knowing that the statutory report and recommendation can actually be read and considered by the trial judge, should expend some effort in a given case to make a recommendation? Would that be a bad thing? It seems not. It would only be something closer to what the legislature intended.

3. *The proposed amendments would allow the opinion and recommendation of the Friend of the Court to be received without the right of cross-examination and would be contrary to the right of due process.*

First, this is a legal, forensic issue, and it is not clear to me why we must be given instruction about due process by psychologists, even if we welcome their comments. And it seems that those who insist on the right to give partisan testimony in court based on facts they select for themselves are not in a good posture to complain about the due process of law.

If the protest is sincere, moreover, it means that the Associations do not care for the friend of the court statute, which has been in effect since 1919 in one form or another, even if it has sometimes been neglected by the judicial branch. True, the amendment to MRE 1101(b)(9) might some day motivate friend of the court agencies to issue meaningful reports and recommendations regarding child custody. The legislature, after all, in its concern for the welfare of minor children of divorce, provided that a neutral, independent agency that owes allegiance only to the court and the children should have such responsibility. What's wrong with that? It is a strange notion of due

process of law that criticizes that resource, but at the same time insists on the right to give adversary expert testimony based on facts gleaned from persons who are not subject to cross-examination.

Dr. Erard mentions *Molloy v Molloy,* 466 Mich 852 (2002), which says that the child custody statute forbids a trial judge, the one person who has the ultimate responsibility for determining custody, cannot examine a child *in camera* about matters unrelated to the child's custodial preference. And yet, under the rule that the Associations want to preserve, a partisan expert can examine a child in the complete privacy of his or her own office and use the information as the expert sees fit. What kind of due process is *that*?

4. *The proposal B version of an amended MRE 703 would lead to cumbersome time-consuming motions in limine in controversies over whether experts have acceptable factual bases for their opinions.*

In my opinion Dr. Erard is right about Alternative B (I will enlarge on that later), but not regarding expert child custody recommendations received under proposed MRE 1101(9). A report received under that rule would be exempted from a hearsay objection under either alternative A or alternative B. There would be no motions in limine.

**Carlo Martina, Esq.**, addressed the court on behalf of the **Family Law Council of the State Bar.** His main points were these:

1. *To require the underlying facts in child custody recommendations to be in evidence in every case is overkill, and it will scare witnesses from talking to the experts.*

This is still another variation on the refusal to recognize that the proposed amendments give a child custody expert the right to rely on hearsay, a matter that the opponents seem incapable of conceding.

Talk about scaring off witnesses. Who is more likely to refuse to cooperate? A witness contacted by an expert appointed by the court, or a witness approached by an expert hired to advance the cause of one party? It is the latter, of course. The proposed amendments will tend to eliminate that source of reluctance, not promote it.

2. *Reports of child custody experts help to settle cases, and only 1% of divorce cases go to trial.*

I am sure that expert reports sometimes help settle cases. Indeed, the Family Law Section's own special edition on expert witnesses, cited in my memorandum of February 23, 2001, included an article by an eminent psychologist, Dr. Melvin Guyer, who said that the *only* utility of expert reports is in getting cases settled. If that is an important reason to keep using that very expensive

device, whose report will be more persuasive to a litigant? The report of an expert hired by the other side? Or the report of an expert appointed by the trial judge? The question answers itself. The amended rule, accordingly, will produce more settlements than the present one.

If there should be any doubt that the present rule is used to hire partisan experts, Mr. Martina admitted as much to the Court:

> In some instances the parties and the court choose one expert for the job. *In some, one or both of the parties hire an expert to assist the trier of fact.* (Transcript, p. 20.)

The adoption of the amendments will eliminate the expensive, burdensome, and inefficient scenario where a party hires a partisan expert; or worse yet, where *both* parties do so.

And what difference does it make if only 1% of divorce cases go to trial? That is still a very large number. And, as one of the justices so aptly asked, why aren't the 1% entitled to have their dispute regulated by proper rules of evidence? In any event, it will not be only the 1% who benefit from the amended rules. Every case, settled or not, will be spared the unnecessary expense of hiring one or more partisan experts; an expense made possible only by the present rules.

3. *It is unrealistic to believe that already overworked Friend of the Court personnel can prepare adequate expert reports, and they will be severely deficient.*

This false issue has already been discussed. The Friend of the Court will not generate the expert opinion report. The agency may continue to make a recommendation, but it's total effort in securing the report of an expert will be to send a form letter to the person or agency chosen by the judge.

Let me conclude this part of the discussion by identifying what is really at stake for the experts if the proposed amendments are adopted. If those amendments will permit a neutral child custody expert to submit a report and recommendation to the court based on whatever hearsay data the expert deems appropriate, why do the psychological associations continue their opposition to any amendment whatsoever? It can only be that they are unwilling to give up what the amendments *would* eliminate: the ability of a party to unilaterally hire an expert to serve the partisan purpose of advancing that party's claim for custody.

The terrible cost and burden of child custody experts engaged as partisan advocates was described at length in my report of February 23, 2001, but I will recount these principal detriments of the practice:

a). It's very expensive and time consuming.

b). Its utility is limited because there is an inherent bias at work, one that is necessarily

recognized by the trial judge.

c). If there is a trial, the judge is nevertheless obliged to listen to lengthy testimony from experts who discuss the very same statutory considerations that the court is obliged to assess, and whose conclusions the judge will know before they take the stand.

d). The only reason these burdens must be endured is because the present rules of evidence allow for it.

Much of the foregoing was demonstrated in the memorandum of February 23, 2001 from writings of the child custody lawyers and experts themselves. And we continue to find evidence in the psychologists' own literature that there is limited value in the recommendations of child custody experts. "Psychology and Child Custody Determinations," was published in 1987 by the University of Nebraska Press and reprinted in 1990, edited by Lois A. Weithorn, assistant professor of psychology at the University of Virginia. She and Dr. Thomas Grisso, professor of psychology and associate professor of psychology and law at St. Louis University, wrote chapter five of the book, which begins at page 157 with this paragraph:

> Many commentators have raised concerns about the value, relevance, and appropriateness of many forms of psychological and psychiatric testimony in divorce custody cases (e.g., Grisso, 1986; Hall & Hare-Mustin, 1983; Halleck, 1980; Melton, Petrila, Poythress, & Slobogin, 1987; Mnookin, 1975; Okpaku, 1976; Reppucci, 1984; Watson, 1969). Melton et al. (1987) have reflected the tone of these criticisms:
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> > There is probably no forensic question on which overreaching by mental health professionals has been so common and so egregious. Besides lacking scientific validity, such opinions have often been based on clinical data that are irrelevant, on their face, to the legal questions in dispute. (p. 330).

If what the psychologists themselves say about their evaluations is true when they are undertaken in good faith, how much more infirm must they be when advanced by an expert retained by only one party?

Finally, on the subject of child custody experts, the remarks of attorney **Anne Argiroff** at the public hearing are revealing. She has been practicing family and appellate law for 15 years and sat on the Family Law Council herself for six years. She has discussed the issue as well with a number of other appellate attorneys who specialize in family law. Not only do they not object to the amendment to Rule 703, they think there should be no exemption for custody experts because, "The subjectivity involved in expert reports in custody cases is rampant." (Transcript, p. 32.)

The proposed amendments do not go as far as Ms. Argiroff would, because they do allow for the report of an independent expert. Ms. Argiroff, apparently, was not aware of the amendment that

would so provide.

In sum, while the child custody expert opinion advocates have been the most strident opponents of amendments to Rule 703, the court should put an end to the diversion created by their continued opposition. The objections have no merit.

### C. The former objections of the Michigan Judges Association and Probate Judges are no longer a consideration for rejecting an amendment to Rule 703.

Here, I simply wish to remind the Court that, although the Michigan Judges Association initially opposed an amendment to MRE 703, on May 23, 2002 Judge Lawrence C. Root, Association president, wrote to the Court indicating the Association's approval of the Alternative B amendment, and the proposed amendment to MRE 1101(b)(9) as well, leaving to the probate judges the matter of subsection 1101(b)(10).[1]

Similarly, while the Michigan Probate Judges Association was also originally opposed to a rule amendment, Judge Milton L. Mack , Jr., Chief Judge of the Wayne County Probate Court, later consulted with the membership of the Association after the promulgation of proposed MRE 1101(b)(10). I did recommend to the Court two relatively minor changes from the published version as a result of suggestions from the probate judges, and Judge Mack represents that the membership was satisfied with those changes. (See my letter to the Court of April 12, 2002.)

I do not wish to ignore, of course, the other organizations and individuals who have written to the court to support the amendment to Rule 703.

### D. The only significant consideration regarding the amendment of Rule 703 is whether it should be adopted in the face of the indifference or opposition of many members of the bar engaged in general litigation, and that question should be resolved in favor of amending the rule.

I submit that the Court's attention should be more directed to areas of litigation where the proposed amendments would make the most significant changes in practice, i.e., in general civil litigation, and particularly in personal injury cases.

We have not heard from plaintiff or defense oriented bar associations, but it is my surmise that neither are particularly inclined toward a change in the rule. One specific sign of opposition is that of the Civil Procedure Committee of the State Bar, reflected in the committee's written

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[1]I will later explain why I believe that Alternative A, the original Committee proposal, is nevertheless the better amendment.

comments to the Court dated August 7, 2002, and in the comments on behalf of that committee by **Ronald Longhofer** at the public hearing. The gravamen of the opposition, is that there is nothing wrong with the present practice, and if there are any abuses, the discretion afforded to the trial judge in the second sentence of MRE 703 is sufficient to cure them.

One thing Mr. Longhofer said in defense of the status quo is quite incorrect. Citing *Koenig v South Haven*, 221 Mich App 711 (1997), he told the Court that no change is necessary because the law in Michigan already says that an expert is not permitted to testify to the hearsay facts that form the factual basis of the expert's opinion. (Transcript, p.26). Anyone who knows what happens in Michigan courtrooms every day can verify that the statement is an incorrect view of both the law and the practice. The Advisory Committee report cites *seven* reported cases (page 8), all of which either say or imply that the expert is permitted to testify about the hearsay bases of the opinion. In *Swanek v Hutzel Hospital*, 115 Mich App 254, 260 (1982), for example, the court said:

> Under MRE 703, it was left to the discretion of the trial judge to admit into evidence the [hearsay] letters containing the underlying facts upon which the court's expert opinion was based.

The Advisory Committee report did go on to cite the *Koenig* case as one that reached a result different from the prevailing view. As against the other authorities, however, and particularly as against the actual practice, *Koenig* is a straw in the wind.

Nevertheless, that the law presently admits a great deal of hearsay is not the same as saying that the bar generally is clamoring for a change, a matter that the Court must certainly include among the considerations whether to amend Rule 703. But it seems to me that the Court has not been in the practice of deciding significant matters of Michigan jurisprudence by counting noses. Its responsibility goes farther. In weighing whatever opposition there is among the bar, there are several things to keep in mind:

A. There is a natural resistance to change, particularly when the status quo is less bothersome than the alternative. The vast majority of the practicing bar in Michigan today have never tried a case without the largesse of Rule 703, and it may be a daunting prospect to lose it.

B. That limited view of many of today's practicing bar does not appreciate that until recently the rules everywhere required proof of the bases of an expert's opinion, and neither does it appreciate that lawyers in at least twelve states do not now and never have practiced under any version of Rule 703.[2] If the rules are amended, the profession will quickly accommodate, and within

[2]After I said in my response to James K. Robinson's original letter to the court that twelve states, including our neighbor Ohio, had never adopted the Rule 703 principle of allowing expert opinion to be based on hearsay, Mr. Robinson in his reply letter of July 16, 2002 attempted to refute that by saying that

a short time, the original practice will seem like the norm again.

C. Because the present practice is the only experience of many, there is minimal appreciation of the corrosive effect of Rule 703 on what has traditionally been one of the mainstays of the Anglo-American system, the right of confrontation, implemented by a rule against hearsay that insures the right to cross-examine the original witnesses.

D. Even those who say that an amendment is unnecessary on the basis that the present rule gives the trial judge discretion to exclude opinions, will acknowledge that such discretion, by and large, is not being exercised. At the public hearing, for example, Justice Young asked Mr. Longhofer about that directly:

> **Justice Young:** We talked about the rule in point one. Point two, in practice do you agree that the practice is not consistently testing the reliability of the underlying data of expert opinions.
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> **Mr. Longhofer:** I would agree with that. Not consistently. (Transcript, p.31)

The indifference or opposition of those engaged in general civil litigation is a legitimate consideration, but not one that should prevent the amendment of Rule 703.

## II. Among the likely candidates for the amendment of Rule 703, the only rational choice is the original recommendation of the Advisory Committee, supplemented by the proposed amendments to Rule 1101.

If MRE 703 should be amended, there are but three apparent candidates: (1) An amendment that would conform MRE 703 to the federal rule, (2) the Alternative B amendment to the rule, and,

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the Ohio rule and *State v Solomon*, 59 Ohio St. 3d 124; 570 NE 2d 1118 (1991), allow an expert to rely on hearsay because they both say that expert opinion can be based on matters "perceived by" the expert. That is a misrepresentation of both the rule and the decision. Ohio's rule 703 says:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing.

Please note that the Ohio rule omitted the federal rule's reference to data "made known to" the expert or data "reasonably relied on" by experts or data that "need not be admissible in evidence." Facts "perceived by" the expert are facts of which the expert has *personal knowledge,* and therefore are not hearsay. In holding that the expert opinion in the *Solomon* was admissible, the court said,

> Both of the doctors herein, whose testimony was disallowed, had examined appellee and, thus, had based their opinions on facts or data perceived by them. *Solomon, supra*, 126.

(3) the original recommendation of the Advisory Committee. (Either of the latter two would be accompanied by the amendments to Rule 1101.)

### A. The federal rule is an unacceptable solution to the problems with MRE 703.

The difficulties with the recently amended federal rule have been already been discussed several times at length: in the original report of the Advisory Committee (p. 10), in the report of February 23, 2001 (p. 17), and in my letter of July 11, 2002, responding to James K. Robinson's earlier letter to the Court. Accordingly, I will merely recapitulate those deficiencies here.

(1) The federal rule still allows expert opinion to be grounded on facts never proven.

(2) Though supposedly not disclosable to a jury, inadmissible foundation facts are nevertheless disclosed to the jury if the proponent of the opinion convinces the judge that "their probative value substantially outweighs their prejudicial effect," or, remarkably, to "remove the sting" of cross-examination.

(3) The probative value of the foundation facts is said to be not for their truth, but to assist the jury in evaluating the expert's opinion, as they are to be told by the judge. That is an instruction that the jury cannot obey, and the instruction is false in any event because, being offered by the proponent of the opinion, they are necessarily being offered for their truth.

(4) If in spite of all the loopholes the proponent is somehow unsuccessful in getting the inadmissible foundation facts before the jury, the opponent faces the unacceptable choice of eschewing cross-examination, or introducing the inadmissible facts one's self through cross-examination.

### B. Alternative B is not an acceptable amendment.

The value of Alternative B, as I understand, is supposed to be that, while it generally prohibits expert opinion from resting on facts not in evidence, it gives limited relief from that stricture by giving the judge discretion to allow the opinion in evidence if based on facts whose truth cannot be disputed in good faith, a strict test that would replace the wide-open but unexercised discretion in the present rule. The new test, it is said, would force judges to fulfill their "gatekeeping" responsibility. I suggest that, while there is a kind of ostensible appeal to this formulation, it is illusory and cumbersome.

First, it is important not to be distracted by nomenclature. The "gatekeeping" contemplated by Alternative B has nothing to do with a trial judge's conventional gatekeeping function.

The "gatekeeping" terminology came in to widespread use with the arrival of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed2d 469 (1993). *Daubert* involved the subject matter of Rule 702 and its common law antecedents, something quite different than that of Rule 703. The aspect of Rule 702 involved in *Daubert* is whether the state of a specialized body of knowledge is sufficiently developed to authorize the expert witness to testify to a given opinion. When the issue is raised it is a preliminary question of fact that must be resolved by the trial judge, ordinarily by a hearing and findings by the court. The *Daubert* case re-awakened the profession's consciousness of the trial court's authority in this process, and it has become commonplace to speak of the judge's "gatekeeping" responsibility in that context.

Rule 703 involves something quite different. It concerns nothing more than whether an expert opinion is authorized by the *facts of the case*, as opposed to the sufficiency of the known principles of the specialized knowledge in question. This is a more fundamental question; one so basic that it never would have been the subject of a separate rule of evidence unless some one decided , as Congress did, that there should be a departure from fundamental principles.

The kind of discretion introduced with Michigan's version of Rule 703 was an attempt to harmonize the traditional foundation requirement with the new latitude of the federal rules. But that discretion, which Alternative B would preserve and re-define, was unprecedented and, indeed, contrary to the traditional notion that the judge is bound by the law as much as are the parties. Whatever discretion that trial judges have had regarding the admission of evidence, it has never extended so far, at least not until the arrival of Rule 703, as to suspend the operation of a rule of exclusion.

The exclusionary rules represent the evolution of the common law over time to exclude relevant evidence in order to serve a higher purpose. Besides the rule against hearsay, for example, the following rules exclude otherwise relevant evidence:

Rule 404 - Character to prove conduct
Rule 407 - Subsequent remedial measures
Rule 408 - Offers of compromise
Rule 409 - Payment of medical expenses
Rule 410 - Plea of nolo contendere
Rule 411 - Liability insurance

Except for defined exceptions, the rules of exclusion are absolute. They restrict the role of a judge in the conduct of a trial just as much as does the substantive law. This Court has taken pains to reaffirm the obligation of the judiciary to adhere to statutory and constitutional enactments without superimposing on them the judge's personal values. The evidentiary rules of exclusion, no less than the substantive law, are the policy of sovereign authority, and it seems anomalous to have a rule of evidence that makes a rule of exclusion optional according to the vagaries of choice of the trial judge.

It is true that Alternative B announces a stricter test than the one employed in the federal rule, i.e., a matter for which "there is no good faith basis for contesting," as opposed to matters of "a type reasonably relied upon by experts in the particular field." But identifying what can't be contested in good faith is still, in the end, a subjective endeavor that employs a subjective standard. The results will be uneven from one courtroom to the next. It is difficult enough to attain equal justice under law when the rules are precise. But when they are vague, as any such test must necessarily be, the results will be all the more variant.

I also suggest that Alternative B, as well as any other version of the Rule 703 principle, poses a threat to more than just the rule against hearsay, the notorious victim to this point. An underlying fact, even though not subject to good faith dispute, might nevertheless offend an exclusionary rule other than the hearsay rule. In that circumstance the opponent may have the unhappy choice between leaving the basis for the opinion undisclosed and putting it before a jury on cross-examination.

What is worse, in my view, is the likelihood that Alternative B will result in the inefficiency, delay, and cost of multiple pretrial hearings. Much of the opposition to an amended Rule 703 comes from the prospect of having to marshal the proofs instead of merely supplying information to one's expert. If an amended rule leaves even a small hole in the dike, as Alternative B does, the pressure to squeeze evidence through it will be great, and I suspect that trial judges and parties will be forced to endure many hearings designed to validate expert opinions on the basis that their underlying facts cannot be disputed in good faith. There is no need for pretrial hearings when one knows in advance that the simple, straightforward test, already used for centuries without incident, will be that the matters assumed as true by the expert witness must be inferable from what is in evidence.

Finally, I suggest that the rules of evidence already contain the virtual equivalent of Alternative B that might be used instead, but without the rigmarole that Alternative B is likely to engender. As noted, Alternative B uses a test based on what cannot be disputed in good faith. That sounds remarkably like the MRE 201(b) test for the kind of fact that is capable of judicial notice, a device already available:

> (b) Kinds of facts. A judicially notice fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

There is still more. Let's not forget MRE 803(24), the "catch-all" exception to the rule against hearsay, which, however strict, provides an open-ended description of evidence that can be admitted under that rule. And even without judicial notice and the catch-all exception, let's recall that the rules of evidence have been softened regarding the admissibility of business records. Opinions and diagnoses are now admissible in business records, unlike the former practice. And, notably, MRE 902(11) was added to the rules as of September 1, 2001 to enable business records to be admitted by certification of their custodian, thereby virtually eliminating the factor that was

original stimulus for enacting FRE 703, the inconvenience of bringing witnesses to court to authenticate records.

In short, counting the many enumerated exceptions as well, there is plenty enough room in the existing rules to admit hearsay to legitimately support expert opinion, without also inserting an essentially undefinable and potentially disruptive device into the rules.

### C. The only acceptable choice is the original amendment recommended by the Advisory Committee.

We should frankly admit that the Rule 703 experiment has been a failure, and that half-measures to correct it will not work. The original recommendation of the Advisory Committee does nothing more than return the practice to its former status, and the court should adopt it, along with the exemptions provided in the proposed amendments to MRE 1101.

Respectfully submitted,

William J. Giovan, Chair
Advisory Committee on the Rules of Evidence

## Proposed Amendments

### Rule 703. Bases of Opinion Testimony by Experts

**(Alternative A)**

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

**(Alternative B)**

(a) Except as otherwise provided in subrule (b), the facts or data in the particular case upon which an expert bases an opinion or inference must be admissible and admitted in evidence.

(b) If the court finds that the proponent of an expert opinion or inference has shown that there is no good-faith basis for contesting the truth or accuracy of specified admissible or unadmitted facts or data in the particular case, the court may admit an expert opinion or inference that is based on those facts or data. The proponent may not disclose the inadmissible or unadmitted facts or data to a jury. If the court is the finer of fact, the court may consider those facts or data only for the purpose of determining whether the required threshold is established.

### Rule 1101 Applicability

(a) [Unchanged.]

(b) *Rules inapplicable.* The rules other than those with respect to privileges do not apply in the following situations and proceedings:

(1) - (8) [Unchanged.]

(9) *Domestic Relations Matters.* The court's consideration of a report or recommendation submitted by the friend of the court pursuant to MCL 552.505(d) or (e).

*(10) *Mental Health Hearings.* In ~~preliminary~~ hearings under Chapters 4, 4A, 5 and 6 of the Mental Health Code, MCL 330.1400 *et. seq.*, the court may consider hearsay data that are part of the basis for the ~~diagnosis~~ OPINION presented by a testifying mental health expert.

*(These changes from the published version of proposed MRE 1101(b)(10) are those recommended by the membership of the Michigan Probate Judges Association.)

Wayne County Friend of the Court
645 Griswold
Detroit, MI 48226

(Date)

To:

Re: Case #_____

Dear:

Pursuant to MCL 552.505(d)(e), and the enclosed order of the Honorable_____, you are requested to prepare a report and recommendation regarding the (custody) (parenting time) (support) of _____, the minor child(ren) of the parties in the above action.

Upon completion of the report, please send copies of the same to this office, the above-named judge, and to counsel for the parties, listed below. You should contact them to arrange interviews of the parties and the child(ren).

Unless otherwise specified below, the fee for your services will be shared equally by the named attorneys.

Sincerely,

Wayne County Friend of the Court,

By_____

cc: Court File
Counsel

Attorney for plaintiff: Attorney for defendant: